



U.S. Department
of Transportation

Research and
Special Programs
Administration

Office of the
Chief Counsel

400 Seventh St. S.W.
Washington, D.C. 20590

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Ms. Jo Ann Williams
Office of Chief Counsel (GC-12)
U.S. Department of Energy
Washington, D.C. 20585

Dear Ms. Williams:

On April 15, 1993, at a meeting attended by representatives of this office, the Federal Highway Administration, the Department of Energy (DOE) and the University of California, we discussed the application of the Hazardous Materials Transportation Act (HMTA), 49 App. U.S.C. §§ 1801 et seq., to hazardous materials transportation at the Los Alamos National Laboratory (LANL). This meeting followed an inquiry to the Research and Special Programs Administration (RSPA) from the University's LANL Counsel, Ellen M. Castille. Specifically, Ms. Castille inquired whether the HMTA and its implementing regulations, 49 C.F.R. Parts 171-180 (the Hazardous Materials Regulations or HMR), apply to the transportation of hazardous materials by the University in its capacity as operator, under contract to the DOE, of the LANL.

This letter sets out the jurisdictional framework of the HMTA as it applies to hazardous materials transportation by Federal agencies and their contractors. Although RSPA exercises rulemaking authority under the HMTA with respect to all hazardous materials transportation in commerce, enforcement authority over land-based transportation is shared with the Federal Highway Administration and the Federal Railroad Administration.

The HMTA, as amended by the Hazardous Materials Transportation Uniform Safety Act, Pub. L. No. 101-615, 104 Stat. 3244 (1990), applies to "any person" who transports hazardous materials in commerce. 49 App. U.S.C. § 1804(a)(3). The term "person" includes any:

government or Indian tribe when it offers
hazardous materials for transportation in
commerce or transports hazardous materials
in furtherance of a commercial
enterprise....

Id. at § 1820(11). Hazardous materials transportation by a Federal, State or local government agency or an Indian tribe, then, is subject to regulation under the HMTA when that transportation is "in furtherance of a commercial enterprise." RSPA defines this term by its converse: governmental transportation is not in furtherance of a commercial enterprise when it is carried out (1) by government personnel and (2) for a governmental purpose.

The sphere of "governmental purpose" cannot be delineated in the abstract. When the activity in conjunction with which the transportation occurs is constitutionally mandated or authorized, when it is a traditional "sovereign" activity or one falling within the police power, or when its benefits accrue to the public as a whole, it is likely to fall within the realm of the governmental purpose. The purpose is more apt to be deemed non-governmental if there is a conscious purpose to generate a profit, if the activity is undertaken by a public corporation with limited liability, or if the activity competes with, or displaces, the private sector. Each case must be considered on its facts.

When the transporter is not the Federal Government itself, but a Federal contractor, the HMTA provides:

Any person who, under contract with any department . . . of the Federal government, transports, or causes to be transported or shipped, a hazardous material . . . shall be subject to and comply with all provisions of [the HMTA], all orders and regulations issued under [the HMTA], and all other substantive and procedural requirements of Federal, State and local governments and Indian tribes (except such requirements that have been preempted by this chapter or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

49 App. U.S.C. § 1818. This provision, added to the statute by the 1990 amendment, merely clarified existing law. See H. Rep. No. 101-444 (Part 2), 101 Cong., 2d Sess. 43 (1990) ("It is the Committee's firm position that [section 1818] simply restates existing law."). The provision means that a Federal contractor cannot claim sovereign immunity and does not share in the

exception from HMTA jurisdiction conferred on the governmental agency itself. Therefore, the contractor's transportation activity is subject to HMTA regulation if that activity is "in commerce."

RSPA accords the "in commerce" requirement its accepted meaning. See 49 App. U.S.C. § 1802(2) (defining transportation in "commerce" as transportation that is or affects interstate trade or traffic). Thus, the HMTA does not apply to transportation that is entirely on private property and neither follows nor crosses a public way. Analogously, transportation by a Federal contractor is not in commerce if it takes place entirely on Federal property to which there is no general public right of access, or if public access legally is denied during the period of transportation.

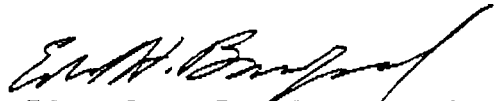
Were the University of California not itself a government agency, its transportation of hazardous materials in the performance of its contractual duties would be subject to the HMTA, to the extent transportation occurred on public roads. However, because the University is a governmental body, its hazardous materials transportation as the operator of the Los Alamos National Laboratory, on public roads or not, is not subject to the HMTA, provided that transportation is by government personnel and for a governmental purpose.

Governmental bodies, as well, are exempt from the registration and fee requirements of 49 C.F.R. Subpart 107.600, even where they transport hazardous materials in commerce. 49 C.F.R. § 107.606. And where transportation otherwise would be subject to the HMTA, it may be excepted from regulation by a specific code provision (e.g., 49 C.F.R. §§ 173.7(b) and 177.806(b), excepting certain national security shipments of Class 7 radioactive materials).

Where the University's hazardous materials transportation, or some part of it, is exempted from HMTA jurisdiction, the University and DOE still may find it desirable to agree, or DOE may choose to require, that transportation shall be in accordance with HMR standards. Such a course may be sensible, particularly given that it may not always be clear where the line between governmental and non-governmental purpose lies. This decision, however, would be one not of the application of the HMTA, but rather of contractual obligations owed to the DOE by the University apart from HMTA or U.S. Department of Transportation jurisdiction. If the HMR did not otherwise apply, the University's agreement, voluntary or through contract, to comply with the HMR would not invoke U.S. DOT enforcement jurisdiction.

I trust this guidance is of assistance to you. Please feel free to call me at 202-366-4400 if you have any further questions on this matter.

Sincerely,



Edward H. Bonekemper, III
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Hazardous Materials Safety &
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Law

cc: Ellen M. Castille
Larry G. Blalock
Paul Brennan